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IN THE COURT OF CRIMINAL APPEALS OF TEXAS

CRAIG DOYAL,

Petitioner

V.

STATE OF TEXAS,

Respondent.

BRIEF OF AMICI CURIAE

TEXAS ASSOCIATION OF SCHOOL BOARDS, INC. ("TASB")
TEXAS ASSOCIATION OF SCHOOL ADMINISTRATORS ("TASA")
TEXAS COUNCIL OF SCHOOL ATTORNEYS ("CSA")

IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF AMICI CURIAE

Nearly 800 public school districts in Texas are members of the Texas Association of School Boards Legal Assistance Fund ("TASB LAF") which advocates the interests of school districts in litigation with potential statewide impact. The TASB LAF is governed by three organizations: the Texas Association of School Boards, Inc. ("TASB"), the Texas Association of School Administrators ("TASA"), and the Texas Council of School Attorneys ("CSA").

TASB is a non-profit corporation whose members consist of approximately 1,030 public school boards in Texas. As locally elected boards of trustees, TASB's members are responsible for the governance of Texas public schools.

TASA represents the state's school superintendents and other administrators responsible for carrying out the education policies adopted by their local boards of trustees.

CSA is comprised of attorneys who represent more than ninety percent of the public school districts in Texas.

The author of this brief is to be paid a fee by TASB LAF for the preparation of this brief.

SUMMARY OF ARGUMENTS

While the Texas Open Meetings Act, Tex. Gov't Code § 551.001 *et seq.* ("TOMA"), is a vital tool in the preservation of open government, its intent and purpose are thwarted by Texas Government Code section 551.143, which is unconstitutionally vague and therefore leads to unintended criminal prosecutions and fear of prosecution that actually hinders open and productive government.

ARGUMENTS AND AUTHORITY[1]

Texas Government Code section 551.143(a) sets forth as criminal conduct vague and unspecified discussions between government officials outside of a properly posted board meeting:

> (a) A member or group of members of a governmental body commits an offense if the member or group of members knowingly conspires to circumvent this chapter by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of this chapter.

Tex. Gov't Code Ann. § 551.143(a) (West 2018) (referred to hereinafter as "§ 551.143(a)").

This Court has recognized that the initial inquiry for whether a criminal statute is vague is the "concept of fairness," or "whether the ordinary, law-

[1] Amici adopt and incorporate by reference the statement of the case and procedural history in Petitioner/Appellee Doyal's Petition for Discretionary Review.

abiding individual would have received sufficient information that his or her conduct risked violating a criminal law." *Bynum v. State*, 767 S.W.2d 769, 773 (Tex. Crim. App. 1989).

> Unlike the claim of a statute being overbroad, a vagueness challenge is applicable to all criminal laws and not merely those that regulate speech. As a fundamental proposition, all criminal laws must give notice to the populace as to what activity is made criminal so as to provide fair notice to persons before making their activity criminal. The rationale for this is obvious: crimes must be defined in advance so that individuals have fair warning of what is forbidden. As the Supreme Court has stated: a lack of notice poses a "trap for the innocent ...," *United States v. Cardiff*, 344 U.S. 174, 176, 73 S.Ct. 189, 190, 97 L.Ed. 200 (1952) and "violates the first essential of due process." *Connally v. General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926). [2]

Bynum, 767 S.W.2d at 773 (footnote omitted).

This Court in *Bynum* recognized the two-part analysis for vagueness adopted by the U.S. Supreme Court:

Vague laws offend several important values. First, because we

[2] The concept that prior notice of criminal offenses is essential to fundamental fairness in a democracy is, somewhat surprisingly, not of ancient vintage. The principle of "legality," or *nulla poena sine lege,* condemns judicial crime creation. The converse, or legislative crime creation, which is an essential element of notice, evolved from the literary and philosophical enlightenment movement in Europe between *c.* 1660 and *c.* 1770. Or, as it was known in England, the Age of Reason. In adopting many of the ideologies prevalent at this time, the emerging American nation elected to replace common law crimes with systematic legislative enactment. Although the revolution in the formation of criminal laws was successful, even as late as the twentieth century some courts were still judicially enacting criminal offenses. For example, in *Commonwealth v. Mochan*, 177 Pa. Super. 454, 110 A.2d 788 (1955), the Court affirmed a misdemeanor conviction for making obscene telephone calls despite the absence of any statute prohibiting such conduct. For an excellent discussion on the evolution of legislative criminal law development see: John Calvin Jefferies, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189 (1985).

> assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.

Bynum, 767 S.W.2d at 773 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972)). "When a vagueness challenge involves First Amendment considerations, a criminal law may be held facially invalid even if the law has some valid application." *Ex parte Ellis*, 309 S.W.3d 71, 86 (Tex. Crim. App. 2010).

"Under the void-for-vagueness doctrine, a statute will be invalidated if it fails to define the offense in such a manner as to give a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited." *State v. Doyal*, 541 S.W.3d 395, 399 (Tex. App.—Beaumont 2018), *petition for discretionary review filed* (Mar. 8, 2018) (citations omitted). But it is not simply the plain meaning of the words, but the context that counts; "Words and phrases shall be read in context and construed according to the rules of grammar and common usage." Tex. Gov't Code Ann. § 311.011(a) (West 2013). While the appeals court below took into consideration the meaning of the words in

§ 551.143(a), it failed to analyze the real concern, that being the combination of the meaning and context. *See Doyal,* 541 S.W.3d at 399-402.

The court of appeals simply analyzed the definition or meaning of the words "conspire," "circumvent," and "secret," but not within the context of the statute. *See id.* at 401-02. The statute self-defines the criminal aspect and the phrase "conspires to circumvent" as the member or group of members "knowingly conspires to circumvent this chapter *by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of this chapter*." Tex. Gov't Code Ann. § 551.143(a) (West 2018) (emphasis added). Thus, the way the statute is written, the act of *meeting in less than a quorum for the purpose of secret deliberations* is the definition of "knowingly conspiring to circumvent" the chapter. The court of appeals failed to analyze the context of the sentence and the sentence structure; the court of appeals failed to scrutinize the entire sentence for context.

"We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (citations and internal quotations omitted). "We take statutes as

we find them, presuming the Legislature included words that it intended to include and omitted words it intended to omit." *Union Carbide Corp. v. Synatzske*, 438 S.W.3d 39, 52 (Tex. 2014) (*citing Presidio Indep. Sch. Dist. v. Scott*, 309 S.W.3d 927, 930 (Tex. 2010)).

We have a clear definition of the terms "conspire" and "circumvent," and even the word "secret," according to the court of appeals. *Doyal*, 541 S.W.3d at 402. However, the vagueness comes in the context of the phrase "by meeting in numbers less than a quorum for the purpose of secret deliberations." Tex. Gov't Code Ann. § 551.143(a) (West 2018). We know "meeting in less than a quorum" is defined by determining what is the number needed for a quorum and subtracting by one or more. We also have a more complexly worded definition from the Texas Attorney General saying the same thing. Tex. Att'y Gen. Op. GA-0326 (May 18, 2005) at 3-5.

The law says it is a criminal act if you meet in "less than a quorum for the purpose of secret deliberations." Tex. Gov't Code Ann. § 551.143(a) (West 2018). The vagueness begins with the definition of "deliberations" since Chapter 551 defines the term "deliberation" as "a verbal exchange during a meeting between a quorum of a governmental body, or between a quorum of a governmental body and another person, concerning an issue within the

jurisdiction of the governmental body or any public business." Tex. Gov't Code Ann. § 551.001(2) (West 2018). For §551.143(a) "deliberations," we have less than a quorum, yet the Government Code defines deliberations for TOMA as something that can only occur in a quorum, so what is the definition of a "non-quorum deliberation?" Is it the same? Can it be the same when the term "deliberation" by statutory definition must first have a quorum? Is a non-quorum deliberation like turkey bacon? (Bacon's original definition is meat that comes from the back and sides of a pig) *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/bacon.

Let's assume they are the same; the discussion of governmental business. We then turn to "secret deliberations," which appear to hinge on the definition of "secret." One presumes this means a nefarious act, and the court of appeals relied on Webster's Dictionary: "'Secret' means 'kept from knowledge or view: concealed, hidden' and 'done or undertaken with evident purpose of concealment[.]'" *Doyal*, 541 S.W.3d at 402. Breaking it down to its essence, any private conversation between two government officials governed by TOMA about governmental business could be criminal. The following are common situations that would occur and, due to the vagueness of the statute, could be criminal (for school board members and possibly other governmental officials):

- a school trustee calling the board president to ask that an item be added to the board agenda;
- after a meeting, the school trustee secretary calling the board president to confirm who seconded a motion;
- a school trustee asking the other trustees to change the date of a board meeting because a conflict has arisen;
- the board president, seeking to call an emergency meeting, contacting one or more trustees to determine the time they are available in order to create a quorum for a meeting; and
- a board president who must miss a meeting calling the board vice president to explain matters on the agenda (or to let him/her know that he/she will be running the meeting).

Of course, persons who intend to circumvent and violate TOMA should be prosecuted. The problem, however, is that innocent, unintentional violations of the law occur without notice or intent. Yes, a person intends to communicate with another when he calls the person, but that does not mean he intends to circumvent the law. But circumvention is defined as "meeting in numbers less than a quorum for the purpose of secret deliberations in violation of this chapter." Tex. Gov't Code Ann. § 551.143(a) (West 2018). Confirming minutes' accuracy, checking to see if someone can attend a meeting at a certain time, asking to add something to an agenda; these are all done regularly in "meetings" in numbers less than a quorum, and they discuss governmental business secretly (which as the court of appeals pointed out, simply means outside of the public's

knowledge or view). *Doyal*, 541 S.W.3d at 402. As the words that make it criminal (conspires to circumvent) are defined within the sentence, all the above acts may be violations of the law because the law is vague.

If § 551.143(a) said "members of a governmental body commit an offense if they knowingly conspire to circumvent this chapter," then the statute would not be vague. However, according to how the statute is written, a person can conspire with him- or herself! The statute inexplicably says a single member can commit this crime, but the definition of a conspiracy is commonly understood to mean "to make an agreement with a group and in secret to do some act (as to commit treason or a crime or carry out a treacherous deed): plot together[.]" Webster's Third International Dictionary 485 (2002); *see also*, *Doyal*, 541 S.W.3d at 402. If a person *thinks about* calling a fellow governmental official they may have committed a crime, according to the way the statute is written (especially if they kept it to themselves, because that would make it a secret deliberation). And how do we know if they got together "for the purpose of secret deliberations," when they could have just gotten together for coffee and then started discussing school business? Is that a crime? Due to the vagueness of the statute, we cannot answer the question.

Moreover, the court of appeal's reliance on *Asgeirsson v. Abbott*, 696

F.3d 454 (5th Cir. 2012) is misguided at best. First, *Asgeirsson* is simply not applicable, as Petitioner thoroughly explains. *See* Pet. for Review at 6-8. Moreover, by relying on *Asgeirsson*, the court of appeals discounts its own finding that courts must follow the plain language of a statute and that "conspire," "circumvent," and "secret" all had plain meanings requiring no special judicial interpretations. *Doyal*, 541 S.W.3d at 401-02. Although the court of appeals heavily quotes *Asgeirsson* throughout its decision, a relevant portion it fails to acknowledge reads as follows:

> Thus, TOMA is violated when 'a quorum or more of a body [...] attempts to avoid [TOMA's] purposes by deliberately meeting in numbers physically less than a quorum in closed sessions to discuss public business **and then ratifying its actions in a physical gathering of the quorum in a subsequent sham public meeting**.'

Asgeirsson, 773 F. Supp. 2d 684, 706–07 (citing Tex. Att'y Gen. Op. GA–0326 at 2 (2005), *Esperanza Peace & Justice Ctr. v. City of San Antonio*, 316 F. Supp. 2d 433, 473 (W.D. Tex. 2001) (emphasis added)).[3]

If it is true that courts are confined to the plain meaning of § 551.143(a) and the terms in § 551.143(a) are clear, then why does the court of appeals rely on cases and an Attorney General's opinion that step *way* outside the plain reading of the statute to provide that § 551.143(a) is only violated if after

[3] Notably, the court of appeals also relies on Tex. Att'y Gen. Op. GA–0326 and *Esperanza* in reaching its decision. *See,* e.g., *Doyal*, 541 S.W.3d 401-02.

discussing public business in less than a quorum, the member or members then ratify their actions in a "sham public meeting?" The statue itself says nothing about subsequent steps that would be required to constitute a criminal act after a member or members initially hold the discussion, yet based on *Asgeirsson*, *Esperanza*, and Tex. Att'y Gen. Op. GA–0326, which are all relied upon by the court of appeals, there must also be ratification in a sham meeting.

Does that mean that unless members later "ratify" their discussion about public business with a vote, then there was no criminal violation? And what if the member or members *never* address the public business in a public meeting after initially speaking about it privately? Based on the authority relied upon by the court of appeals, there would be no violation, although the statute is vague as to the need for "ratification" and a "sham meeting." The courts in *Asgeirsson* and *Esperanza* and the Attorney General clearly acknowledged that § 551.143(a) was vague and needed further clarification when they asserted numerous additional requirements far outside of the plain language of § 551.143(a) in order to constitute a violation.

Texas Municipal League, *et al.*'s amici curia brief more fully outlines the cavalcade of additional concerns that continue to plague government officials subject to § 551.143(a) and the negative impact it has on both governance and

attracting quality candidates to fill those positions. TASB, TASA, and CSA share the same concerns and adopt and incorporate them herein by reference.

Again, TASB, TASA, and CSA all affirm and support the need for penalties in cases of intentional violations of open government laws. Those that conspire to circumvent TOMA should be prosecuted. The problem with § 551.143(a) is the statute's language is unconstitutionally vague and defines "conspiring to circumvent" not as two persons getting together to avoid the procedures of TOMA, as intended, but rather makes criminal one trustee pondering the avoidance of TOMA or a trustee asking another trustee to add something to the next agenda. Any ordinary, law-abiding individual would not have sufficient information that his or her conduct risked violating a criminal law, the very crux of fairness and criminal intent.

PRAYER

For the reasons described above, the Texas Association of School Boards, Inc., Texas Association of School Administrators, and the Texas Council of School Attorneys respectfully urge and request that the Court grant the petition for discretionary review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), I hereby certify that this brief contains 3,531 words. This is a computer-generated document created in Microsoft Word, using 14-point typeface for all text, except for footnotes which are in 12-point typeface. In making this certificate of compliance, I have relied on the word count provided by the software used to prepare the document.

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